Supreme Court, U.S.
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Nos. 81-2147 and 81-2188
(Consolidated)

In The
Supreme Court of the United States
October Term, 1982

STATE OF ARIZONA, et al.,
Petitioners,

vs.

SAN CARLOS APACHE TRIBE OF ARIZONA, et al.,
Respondents.

STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT JAMES BOWEN in No. 81-2188

MONTANA LEGAL SERVICES ASSOCIATION
801 North Last Chance Gulch
Helena, MT 59601
(406) 442-9830

STEVEN L. BUNCH
Counsel for Respondent Bowen

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

I. Do application of principles of "wise judicial administration" as set forth by this Court in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), favor federal court over state courts as the appropriate forum in the Montana water rights litigation at issue?

II. Do Montana state courts lack jurisdiction over Indian water rights?

A. Does the Indian lands disclaimer clause of the Montana Enabling Act constitute a federal statutory bar to assertion of state court jurisdiction over Indian water rights?

B. Do Montana state courts have jurisdiction over almost 3,000,000 acres of Indian allotment land if the owners of such land have received no notice of the state court proceedings?

C. Are the owners of Indian allotment land necessary parties to any comprehensive stream adjudication due to the federal government's conflicts of interest in this litigation?

TABLE OF CONTENTS

Pages

Table of Authorities iii

Constitutional Provisions and Statutes Involved 1

Statement 2

Summary of the Argument 5

Argument 7

I. Application of the factors set forth by this Court in the *Akin* case support federal court rather than state court, as the appropriate forum. 7

II. Federal court is the appropriate forum because Montana state courts lack jurisdiction over Indian water rights. 7

A. Introduction 7

B. The Disclaimer Clauses in Montana's Enabling Act, as Incorporated in the Montana Constitution, bar Montana state courts from asserting jurisdiction over on-reservation Indian water rights. 8

1. Incorporation. 8

2. The governmental/proprietary distinction is a fundamentally unworkable test. 8

C. The Montana state court proceedings afford no personal notice to Indian allottees, therefore Montana lacks jurisdiction over Indian allottees and any attempted exercise of state court jurisdiction would be a denial of due process. 10

TABLE OF CONTENTS—Continued

Pages

D. The Federal Government cannot represent absent Indian parties in this litigation because the conflicts of interest between Indian water rights and other conflicting federal water interests render the doctrine of virtual representation inapplicable and denies the absent parties' due process of law. 19

Conclusion 28

TABLE OF AUTHORITIES

Cases

Alexander v. Title Insurance & Trust Co., 48 Cal. App. 2d 488, 119 P. 2d 992 (1941) 24

Andrus v. Utah, 446 U. S. 500 (1980) 5

Annis v. Dewey County Bank, 334 F. Supp. 132 (D. S. D. 1971) 16

Arizona et al. v. San Carlos Apache Tribe of Arizona, 668 F. 2d 1093 (9th Cir. 1983), No. 81-2147 5

Arizona v. California, 373 U. S. 546 (1963) 15

Arizona ex rel. Merrill v. Turtle, 413 F. 2d 683 (9th Cir. 1969) 16

Armstrong v. Manzo, 380 U. S. 554 (1965) 12

Arnett v. Kennedy, 416 U. S. 134 (1974) 12, 16

Atwood v. Rhode Island Hospital Trust Co., 275 F. 513 (1st Cir. 1921) 24

TABLE OF AUTHORITIES-Continued

Pages

Bad Horse v. Bad Horse, 163 Mont. 445, 517 P. 2d 893, *cert. denied* 419 U. S. 847 (1974) 16

Baldwin v. Hale, 1 Wall. 223 (1864) 13

Barry v. Barchi, 443 U. S. 55 (1979) 12

Bell v. Burson, 402 U. S. 535 (1971) 12

Benally v. Marcum, 553 P. 2d 1270 (N. M. 1976) 16

Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971) 25

Brahy v. Federal Radio Comm., 59 F. 2d 879 (D. C. Cir. 1932) 10

Browning v. Hooper, 269 U. S. 396 (1926) 13

California v. United States, 245 F. 2d 647 (9th Cir. 1956) 26

Cameron v. White, 128 Okla. 251, 262 P. 664 (1928) 24

Carpenter v. Shaw, 280 U. S. 363 (1929) 14

Central of Georgia R. Co. v. Wright, 207 U. S. 127 (1907) 13

Cheseboro v. Los Angeles County Flood Control Dist., 306 U. S. 549 (1939) 13

Choate v. Trapp, 224 U. S. 665 (1912) 4, 14

Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) 13

Colorado River Water Conservation District et al. v. United States and United States v. Akin, 424 U. S. 800 (1976) ..... passim

TABLE OF CONTENTS—Continued

Pages

Confederated Colville Tribes v. Walton, 647 F. 2d 42 (9th Cir. 1981), *cert. denied* 50 U. S. L. W. 3448 (1981) 2, 11, 15

Connell v. Higginbotham, 403 U. S. 207 (1971) 12

County of Mahnomen v. United States, 319 U. S. 474 (1943) 14

Covey v. Town of Somers, 351 U. S. 141 (1956) 12

D'Arcy v. Ketchum, 11 How. 165 (1850) 6, 12, 13

Davidson v. New Orleans, 96 U. S. 97 (1878) 13

Dixon v. Love, 431 U. S. 105 (1977) 12

Drummond v. United States, 324 U. S. 316 (1945) 9

Dugan v. Rank, 372 U. S. 609 (1963) 8, 26

Dupasseur v. Rochereau, 88 U. S. 130 (1875) 13, 18

Eisen v. Carlisle & Jacquelin, 417 U. S. 156 (1974) 12, 17, 26

Embree v. Kansas City & Liberty Blvd. Road Dist., 240 U. S. 272 (1912) 13

English v. Richardson, 224 U. S. 680 (1912) 14

Fairbanks v. United States, 223 U. S. 215 (1912) 13

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112 (1896) 13

Francisco v. State, 556 P. 2d 1 (Ariz. 1976) 16

Fuentes v. Shevin, 407 U. S. 67 (1972) 12

TABLE OF AUTHORITIES-Continued

	Pages
Fullmer v. Harper, 517 F. 2d 20 (10th Cir. 1975)	25, 28
Gagnon v. Scarpelli, 411 U. S. 778 (1973)	12
Gleason v. Wood, 224 U. S. 679 (1912)	14
Glidden v. Harrington, 189 U. S. 255 (1903)	13
Goldberg v. Kelly, 397 U. S. 254 (1970)	12
Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117 (1926)	13
Goss v. Lopez, 419 U. S. 565 (1975)	12
Grannis v. Ordean, 234 U. S. 385 (1913)	13
Greene v. Lindsey, — U. S. —, 50 U. S. L. W. 4483	12, 15, 18
Greene v. McElroy, 360 U. S. 474 (1959)	12
Griffin v. Griffin, 327 U. S. 220 (1946)	13
Gritts v. Fisher, 224 U. S. 640 (1912)	4
Hagar v. Reclamation Dist. No. 108, 111 U. S. 701 (1884)	13
Hancock v. Muskogee, 250 U. S. 454 (1919)	13
Hansberry v. Lee, 311 U. S. 32 (1940)	passim
Hecht v. Monaghan, 307 N. Y. 461, 121 N. E. 2d 421 (1954)	11
Heckman v. United States, 224 U. S. 413 (1912)	4, 19, 23, 24
Hibben v. Smith, 191 U. S. 310 (1903)	13

TABLE OF AUTHORITIES-Continued

Pages

Hovey v. Elliott, 167 U. S. 409 (1897) 13

Illinois Nat'l. Bank v. Gwinn, 390 Ill. 345, 61 N. E. 2d 249 (1945) 24

Indian Towing Co. v. United States, 350 U. S. 61 (1955) 6, 10

In Re Gault, 387 U. S. 1 (1967) 12

In Re Ruffalo, 390 U. S. 544 (1968) 12

Jacob v. Roberts, 223 U. S. 261 (1912) 13, 18

Jicarilla Apache Tribe v. United States, 601 F. 2d 1116 (10th Cir. 1979) 26

Jones v. Meehan, 175 U. S. 1 (1899) 14

Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200 (9th Cir. 1973) 13

Kennard v. Louisiana, 92 U. S. 480 (1876) 13

Little Horn Bank v. Stops, 170 Mont. 510, 555 P. 2d 211, *cert. denied* 431 U. S. 924 (1977) 16

Londoner v. Denver, 210 U. S. 373 (1908) 13

Louisville and Nashville R. Co. v. Schmidt, 177 U. S. 230 (1900) 13

Mackey v. Montrym, 443 U. S. 1 (1979) 12

Manygoats v. Kleppe, 558 F. 2d 556 (10th Cir. 1977) 20, 22

Martin v. Denver Juvenile Court, 493 P. 2d 1093 (Colo. 1972) 16

TABLE OF AUTHORITIES-Continued

Pages

Mathews v. Eldridge, 424 U. S. 319 (1976) 12, 16

McClanahan v. Arizona Tax Commission, 411 U. S. 164 (1973) 5

Mills v. Habuetzel, — U. S. —, 50 U. S. L. W. 4372 (April 5, 1982) 13, 15

Minnesota v. United States, 305 U. S. 382 (1939) 11

Morrissey v. Brewer, 408 U. S. 471 (1972) 12

Morton v. Mancari, 417 U. S. 535 (1974) 27

Mott v. United States, 283 U. S. 747 (1931) 14

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) ..... passim

Navajo Tribe v. United States, 374 F. 2d 320 (Ct. Cl. 1966) 22

New Mexico v. Aamodt, 537 F. 2d 1102 (10th Cir. 1976) 23

New York v. N. Y., N. H. & R. R. Co., 344 U. S. 293 (1953) 12

New York v. United States, 326 U. S. 572 (1946) 10

Northern Cheyenne Tribe v. Adsit, 668 F. 2d 1080 (9th Cir. 1982) 4

Northern Cheyenne Tribe v. Hollobreast, 425 U. S. 649 (1976) 27

Northern Cheyenne Tribe v. Tongue River Water Users Ass'n., CV-75-6-BLG, 484 F. Supp. 31 (Mont. 1979) 2, 4

TABLE OF AUTHORITIES-Continued

Pages

Oklahoma Tax Comm'n. v. United States, 319 U. S. 598 (1943) 14

Opp Cotton Mills v. Administrator, 312 U. S. 126 (1941) 13, 16

Paulsen v. Portland, 149 U. S. 30 (1893) 13

Pence v. Kleppe, 529 F. 2d 135 (9th Cir. 1979) 13

Pennoyer v. Neff, 95 U. S. 714 (1878) 13, 16

Perry v. Sindermann, 408 U. S. 593 (1972) 12

Personnel Board for Mobile County v. Bunkley, 255 Ala. 299, 51 So. 2d 368 (1951) 11

Pittsburg L. C. & R. R. Co. v. Backus, 154 U. S. 421 (1894) 13

Poafpybitty v. Skelly Oil Co., 390 U. S. 365 (1968) 14, 23

Rand v. Walker, 117 U. S. 340 (1885) 24

Ray v. Norseworthy, 23 Wall. 128 (1875) 13

Rees v. City of Watertown, 19 Wall. 107 (1874) 13

Rice v. Olson, 324 U. S. 786 (1945) 5

Rincon Bank of Mission Indians v. Escondido Mutual Water Co., 459 F. 2d 1082 (9th Cir. 1972) 19, 22

Roller v. Holly, 176 U. S. 398 (1900) 13

Schaffer v. Heitner, 433 U. S. 186 (1977) 18

Schroeder v. New York, 371 U. S. 208 (1962) 12, 14, 15, 16, 18

TABLE OF AUTHORITIES-Continued

Pages

Schnorbach v. Fuqur, 70 F. R. D. 424 (1975) 25

Scott v. McNeal, 154 U. S. 34 (1894) 13

Security Trust Co. v. Lexington, 203 U. S. 323 (1906) 13

Seminole Nation v. United States, 316 U. S. 286 (1942) 22

Siniscal v. United States, 208 F. 2d 406 (9th Cir. 1953) 20, 22

Sizemore v. Brady, 235 U. S. 441 (1914) 14

Slowchower v. Board of Education of New York, 350 U. S. 551 (1956) 12

Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 12

Southern R. Co. v. Virginia, 290 U. S. 190 (1933) 13

Southwest Airlines Co. v. Texas International Airlines Inc., 546 F. 2d 184 (5th Cir. 1977) 25

Spencer v. Merchant, 125 U. S. 345 (1888) 13, 15

Spieser v. Randall, 357 U. S. 513 (1958) 12

Stanley v. Illinois, 405 U. S. 645 (1972) 12

State v. Pollock, 251 Ala. 603, 38 So. 2d 870 (1948) 11

State ex rel. Old Elk v. District Court, 170 Mont. 208, 552 P. 2d 1394 (1976) 16

Tiger v. Western Investment Co., 221 U. S. 286 (1911) 27

TABLE OF AUTHORITIES-Continued

Pages

Three Tribes of Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 290 F. 2d 686 (1968) 23

Trbovich v. United Mine Workers, 404 U. S. 528 (1972) 22

Turner v. Wade, 254 U. S. 64 (1920) 13

United States v. Aageson et al., CV-79-40-BLG 4

United States v. Aasheim et al., CV-79-40-BLG 4

United States v. Abell et al., CV-79-33-177 4

United States v. AMS Ranch, Inc. et al., CV-79-22-GF, 484 F. Supp. 31 (Mont. 1979) 4

United States v. Big Horn Low Line Canal et al., CV-75-34-BLG, 484 F. Supp. 31 (Mont. 1979) 2

United States v. Gila River Pima-Maricopa Indian Community, 391 F. 2d 53 (9th Cir. 1968) 19, 22

United States v. Illinois Central R. Co., 291 U. S. 457 (1934) 13, 16

United States v. Mason, 412 U. S. 391 (1973) 9, 24

United States v. Mitchell, 445 U. S. 535 (1980) 24

United States v. Payne, 264 U. S. 446 (1924) 24

United States v. Powers, 305 U. S. 527 (1939) 2, 11, 15

United States v. Rickert, 188 U. S. 432 (1903) 14

United States v. Sioux Nation, 448 U. S. 871 (1980) 28

TABLE OF AUTHORITIES-Continued

Pages

United States v. Southern Pacific Transportation Co., 543 F. 2d 676 (9th Cir. 1976) 20, 22

United States v. Tongue River Water Users Ass'n., CV-20-BLG, 484 F. Supp. 31 (Mont. 1979) 2

United States v. Truckee-Carson Irrigation District, 649 F. 2d 1286 (9th Cir. 1981), modified at 666 F. 2d 351, *cert granted* 51 U. S. L. W. 3287 (1982) 23

United States ex rel. Turner v. Fisher, 222 U. S. 204 (1911) 13, 16

Walker v. Hutchinson, 352 U. S. 112 (1956) 12, 15, 18

Walston v. Nevin, 128 U. S. 578 (1888) 13

Ward v. Love County, 25 U. S. 17 (1919) 14

Washington v. Confederated Tribes, 447 U. S. 134 (1980) 9

Webster v. Reid, 11 How. 437 (1850) 10, 13, 17

West Ohio Gas Co. v. Public Utility Comm'n., 294 U. S. 63 (1935) 13

Wheeler v. Montgomery, 397 U. S. 280 (1970) 12

Williams v. Johnson, 239 U. S. 414 (1915) 14

Williams v. Lee, 358 U. S. 217 (1959) 5

Willner v. Committee on Character, 375 U. S. 950 (1963) 12

Windsor v. McVeigh, 93 U. S. 274 (1876) 13

TABLE OF AUTHORITIES-Continued

	Pages
Winters v. United States, 207 U. S. 564 (1908)	15
Winton v. Amos, 255 U. S. 373 (1921)	27
Wisconsin v. Constantineau, 400 U. S. 433 (1971)	12
Wolff v. McDonnell, 418 U. S. 539 (1974)	12
Worcester v. Georgia, 31 U. S. 515 (1832)	5
Zablocki v. Redhail, 434 U. S. 374 (1978)	26
Constitution and Statutes	
U. S. Const. amend V	2, 13
25 U. S. C. § 348	4, 11, 14
25 U. S. C. § 175	19
43 U. S. C. § 666 (McCarran Amendment)	3, 8
Act of Feb. 8, 1887, 24 Stat. 388	11
F. R. Civ. P. Rule 23 (a) (4)	20
Mont. Rev. Code Ann. § 89-872 (1947)	3
Mont. Code Ann. § 85-2-211 (1979)	4
Mont. Code Ann. § 85-2-213 (1979)	14
Senate Bill 76	3, 4
Other Authority	
A. B. A. Code of Professional Responsibility D. R. 5-105	27
Black's Law Dictionary (1951)	20

TABLE OF AUTHORITIES-Continued

Pages

Bogart on Trusts (2d Ed. 1960) 24

Cohen, *Handbook of Federal Indian Law* (1982) 11

Davis, *Administrative Law Text* (1972) 9

Stone, *Are There Any Adjudicated Streams in Montana?*, 19 Mont. L. Rev.19 (1957) 26

Stone, *The Long Count On Dempsey; No Final Decision In Water Right Adjudication*, 31 Mont. L. Rev. 1 (1969) 26

Valente, *Local Government Law* (1980) 9

Veeder, *Confiscation of Indian Winters Rights In The Upper Missouri River Basin*, 21 So. Dak. L. Rev. 282 (1976) 21

Veeder, *Water Rights In The Coal Fields Of The Yellowstone River Basin*, 40 Law and Contempory Problems 77 (1976) 21

Young, *Interagency Conflicts Of Interest: The Peril To Indian Water Rights*, Law And The Social Order, 328 (1972) 21

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the authority cited in the Petition for Writ of Certiorari and Appendix thereto the following authority is germane to resolution of this case:

U. S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

In June 1975 the Northern Cheyenne Tribe[1] and the federal government[2] filed suit to comprehensively litigate the water rights of the Tongue River drainage. At approximately the same date the federal government also filed suit[3] on behalf of the Crow Tribe to comprehensively litigate the water rights of the Big Horn River drainage. These suits were filed in the United States District Court

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[1] *Northern Cheyenne Tribe* v. *Tongue River Water Users Ass'n.*, CV-75-6-BLG, reported at 484 F. Supp. 31 (D. Mont. 1979). Respondent Bowen, an heir of a Northern Cheyenne allottee, was served with process as a named defendant in this case. Mr. Bowen supports federal jurisdiction in this case due to the nature of allottees', and their successors', reserved rights. See *United States* v. *Powers*, 305 U. S. 528 (1939); *Confederated Colville Tribes* v. *Walton*, 647 F. 2d 42 (9th Cir. 1981) *cert. denied* 50 U. S. L. W. 3448 (1981).

[2] *United States of America* v. *Tongue River Water Users Ass'n.*, CV-20-BLG, reported at 484 F. Supp. 31 (D. Mont. 1979).

[3] *United States of America* v. *Big Horn Low Line Canal et al.*, CV-75-34-BLG, reported at 484 F. Supp. 31 (D. Mont. 1979).

for the District of Montana, Billings Division. These suits are particularly important because they seek to systematically quantify and inventory the water appropriations for the major rivers of South Central Montana whose water rights are being significantly impacted by current and anticipated large scale coal mining and the resulting industrialization.

At the time these suits were filed, the laws of the State of Montana contained no provision for comprehensive stream adjudication of the Tongue or Big Horn Rivers. The only attempt at determining water rights in Montana at this time was an adjudication involving the Powder River drainage which lies east of the Tongue and Big Horn drainages. *See* Mont. Rev. Code Ann. § 89-872, *et seq.* (1947).

The State of Montana and numerous individual defendants moved to dismiss these suits. Briefing these motions was stayed pending the outcome of *Colorado River Water Conservation District, et al. v. United States* and *United States v. Akin*, 424 U.S. 800 (1976) (hereafter *Akin*), in this Court. After *Akin* was decided the motions were briefed arguing the application of *Akin* and the McCarran Amendment, 43 U.S.C. § 666.

The federal litigation of water rights in Montana lay dormant from 1976 until 1979. In its 1979 session the Montana Legislature was considering Senate Bill 76 which set forth a scheme purporting to establish a statewide system for comprehensive stream adjudications. Evidently in response to this pending bill, the federal government

filed four more lawsuits[4] on behalf of several other Montana Indian tribes and Indian allottees[5] to comprehensively litigate the water rights in drainages in which these tribes have an interest. Thus the federal and tribal plaintiffs won the "race to the courthouse" in all the Montana federal proceedings.

Subsequently, the Montana Legislature passed Senate Bill 76 in 1979. See Mont. Code Ann. § 85-2-211, *et seq.* (1979).

The District Court judges having jurisdiction over these cases consolidated them for the purpose of considering the motions to dismiss. The District Court issued one decision dismissing all these cases based upon its interpretation of principles of "wise judicial administration" as enunciated in *Akin. Northern Cheyenne Tribe v. Tongue River Water Users Assoc.*, 484 F. Supp. 31 (D. Mont. 1979).

On appeal the Ninth Circuit reversed, holding the federal courts, not state courts, are the proper forum under the *Akin* analysis. *Northern Cheyenne Tribe v. Adsit*, 668 F. 2d 1080 (9th Cir. 1982).

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[4]*United States of America v. Aasheim, et al.*, CV-79-40 BLG; *United States of America v. Aageson, et al.*, CV-79-21-GF; *United States of America v. AMS Ranch, Inc., et al.*, CV-79-22-GF; *United States of America v. Abell, et al.*, CV-79-33-M; reported at 484 F. Supp. 31 (D. Mont. 1979).

[5]The Indian lands here at issue over which the federal government has trusteeship powers, fall into two catagories. First is tribal land which is communally held, with no tribal member having vested rights in this land. *Gritts v. Fisher*, 224 U. S. 640 (1912). Second is allotment land, in which individual Indian allottees hold vested property rights, but which is held in trust by the federal government. *Choate v. Trapp*, 224 U. S. 665 (1912); *Heckman v. United States*, 224 U. S. 413 (1912); 25 U. S. C. § 348.

The State of Montana and numerous private parties petitioned this Court for a writ of certiorari to review the Ninth Circuit's decision. This Court granted the petitions for certiorari in this case and several Arizona cases.[6]

SUMMARY OF THE ARGUMENT

The *Akin* case recognized federal court deference to state water rights litigation is inappropriate if the state courts lack jurisdiction over Indian water rights. This brief discusses several reasons why Montana state courts lack jurisdiction over the Indian water rights at issue.

First, the plain terms of the "solemn agreement", *Andrus v. Utah*, 446 U.S. 500, 507 (1980), in Montana's Enabling Act, disclaiming state jurisdiction over Indian lands, constitutes a federal statutory bar to Montana state court jurisdiction over Indian water rights. Rather, Indian water rights remain within "the exclusive province of the Federal Government and the Indians themselves", *McClanahan v. Arizona Tax Comm'n.*, 411 U.S. 164, 168 (1973), for leaving Indians free from state jurisdiction is a tradition "deeply rooted in our Nation's history", *Rice v. Olson*, 324 U.S. 786, 789 (1945). *See e.g., Williams v. Lee*, 358 U.S. 217 (1959), and *Worcester v. Georgia*, 31 U.S. 515 (1832).

While we rely by-in-large on the arguments of the respondent Crow Tribe, we also emphasize use of the gov-

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[6] *Arizona, et al. v. San Carlos Apache Tribe of Arizona, et al.*, No. 81-2147.

ernmental/proprietary distinction, proposed by the petitioners as the test for determining the scope of the disclaimer clause, is an exercise in futility. It has been renounced as fundamentally unworkable by the commentators and this Court alike in such terms as "quagmire", "self defeating", and "inherently unsound", *Indian Towing v. United States*, 350 U.S. 61, 65 (1955). Use of the governmental/proprietary distinction to determine the scope of state jurisdiction on Indian reservations can only result in hopelessly pointless litigation inevitably producing the "quagmire" condemned by this Court in *Indian Towing*. This is not a productive path. This Court should not embark upon it.

Second, Montana state courts do not have jurisdiction over individual Indian allotment owners because they have not been made parties to the state adjudication. The notice procedures for the state adjudication are fixed by statute. While other individual property owners receive individual notice of the proceedings, the Indian allottees have received no personal notice and such notice is not contemplated by the statute. Consequently, Montana cannot purport to exercise jurisdiction over Indian allotment water rights. Exercise of such purported jurisdiction without notice would be an "illegitimate assumption of power", *D'Arcy v. Ketchum*, 11 How. 165, 174 (1850), and a denial of due process. As applied to Indian allottees, any state court decree would be void. Jurisdiction over these Indian allottees is essential, for Indian allotment land includes over 12,000 parcels of land totalling almost 3,000,000 acres. Without jurisdiction over these interests, the state proceeding in Montana simply cannot result in a comprehensive stream adjudication.

Indian allottees may not be bound by the state decree due to joinder of their trustee, the federal government under the McCarran Amendment. Such a result requires the operation of the doctrine of virtual representation. However, the pertinent authority uniformly rejects application of the doctrine of virtual representation in cases such as this, where the interests of the party active in the litigation conflict with the interests of the absent parties. As the Department of Justice represents numerous interests hostile to Indian water rights, they may not purport to represent absent Indian interests consonant with the requirements of our adversarial system of litigation.

ARGUMENT

I. Application of the factors set forth by this court in the Akin case support federal court, rather than state court as the appropriate forum.

Respondent Bowen hereby incorporates the arguments, as set forth in the other respondents' briefs, regarding application of the jurisdictional considerations announced in the *Akin* case herein.

II. Federal court is the appropriate forum because Montana state courts lack jurisdiction over Indian water rights.

A. Introduction.

These cases involve the applicability of the *Akin* case to several competing federal court and state court river adjudications in Montana and Arizona. The McCarran

Amendment, 43 U.S.C. § 666, which is the basis for the state litigation, demands no less than a comprehensive stream adjudication. *Dugan v. Rank*, 372 U.S. 609 (1963). Central to this "comprehensive" stream adjudication requirement is the scope of state court jurisdiction over Indian lands. Absent concurrent state and federal court jurisdiction over Indian water rights, dismissal of the federal suits due to "wise judicial administration", *Akin*, 424 U.S. at 817, would be unwarranted because ". . . given the claims for Indian water rights in this case, dismissal clearly would have been inappropriate if the state court had no jurisdiction to decide these claims." *Akin*, 424 U.S. at 809. This brief discusses several reasons why Montana state courts lack jurisdiction over Indian water rights, rendering federal court the appropriate forum.

B. The Disclaimer Clauses in Montana's Enabling Act, As Incorporated In The Montana Constitution, Bar Montana State Courts From Asserting Jurisdiction Over On-Reservation Indian Water Rights.

1. Incorporation:

Respondent Bowen hereby incorporates the arguments as set forth in the Brief of the Respondent Crow Tribe on the disclaimer issue herein. The arguments of the Crow Tribe are fully applicable to individual Indian allotment owners. In addition we submit the following issue.

2. The Governmental/Proprietary Distinction Is A Fundamentally Unworkable Test.

In adopting a jurisdictional test for the disclaimer clause this Court should be cautious to adopt a test which

my be practically applied, for "if the doctrine of stare decisis has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance." *United States v. Mason*, 412 U. S. 391, 399-400 (1973). One should heed the admonition of Mr. Justice Frankfurter in *Drummond v. United States*, 324 U. S. 316, 318 (1945), that "[t]hese provisions have the characteristic infelicity of draftsmanship in Indian legislation which is such a fertile breeder of wasteful litigation." While this remark was directed at legislation, the problem of "infelicity" causing "wasteful litigation" is certainly applicable to the jurisdictional test proposed to this Court by the petitioners. As stated by Mr. Justice Rehnquist in *Washington v. Confederated Tribes*, 447 U. S. 134, 176 (1980) (concurring and dissenting opinion), "I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years."

When the governmental/proprietary distinction is examined in terms of a "well-defined body of principles", it has little to recommend it. The commentators have renounced the utility of the governmental/proprietary distinction in such terms as "hopelessly blurred and confusing", "the conceptual distinction invites erratic applications", "the instability . . . is clear", "muddles the issue", and "compounds practical problems as well as legal analysis."[7] This Court has joined the chorus of dissatisfaction with the governmental/proprietary distinction denominating it "too shifting a basis for determining

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[7]Valente, *Local Government Law*, 36, 68, 100, 712, 830 (1980). See also Davis, *Administrative Law Text* § 25.01 (1972).

constitutional power and too entangled in expediency to serve as a dependable legal criterion" and "an attempt to separate manifestations of indivisible governmental powers." *New York v. United States,* 326 U. S. 572, 580 (1946). Similarly in *Indian Towing Co. v. United States,* 350 U. S. 61 (1955), this Court described the governmental/proprietary distinction in such terms as "quagmire that has long plagued the law", "irreconcilable conflict", "self defeating", "awkward and contradictory", and resulting in "the inevitable chaos when courts try to apply a rule of law that is inherently unsound." 350 U. S. at 65. Enough said.

As the governmental/proprietary distinction is not a "dependable legal criterion", it should be rejected by this Court as the jurisdictional test for the disclaimer clause. If this Court does adopt this distinction as the jurisdictional test, we submit it will prove contrary to the "well defined body of principles" desired, and will be a "fertile breeder of wasteful litigation" returning to haunt the halls of this Court time and time again, producing the "quagmire" denounced by this Court in *Indian Towing.*

C. The Montana State Court Proceedings Afford No Personal Notice To Indian Allottees, Therefore Montana Lacks Jurisdiction Over Indian Allottees And Any Attempted Exercise Of State Court Jurisdiction Would Be A Denial Of Due Process.

Jurisdiction[8] over Indian trust allottees[9] is crucial to a comprehensive stream adjudication. As applied to the

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[8]Notice is a jurisdictional requisite. *Pennoyer v. Neff,* 95 U. S. 714 (1878); *Webster v. Reid,* 11 How. 437 (1850); *Brahy v.*

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Tongue River litigation, the Northern Cheyenne Indian Reservation has 1,255 allotments in trust totaling 132,973.27 acres and the Crow Indian Reservation has 2,996 allotments in trust totaling 1,147,459.64 acres. The other reservations in Montana have 8,236 allotments in trust, for a total of 12,487 parcels of land held in trust for Indians by the federal government. This land totals 2,974,931.98 acres or 4,648.3 square miles of land situated in the drainages at issue.[10]

To obtain jurisdiction over the allottees or allotments requires notice of the proceedings "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mul-*

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Federal Radio Comm., 59 F. 2d 879 (D. C. Cir. 1932); *Personnel Board for Mobile County v. Bunkley*, 255 Ala. 299, 51 S. 2d 368 (1951); *State v. Pollock*, 251 Ala. 603, 38 S. 2d 870 (1948); and *Hecht v. Monaghan*, 307 N. Y. 461, 121 N. E. 2d 421 (1954).

[9]Indian owners of trust allotments hold title under the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, which subdivided formerly communally held tracts of tribal lands into individual parcels, with the individual allottee holding equitable title and United States holding legal title as trustee. *Minnesota v. United States*, 305 U. S. 382, 386 (1939); 25 U. S. C. § 348. *See* Cohen, *Handbook of Federal Indian Law*, pp. 612-27 (1982). The federally reserved water rights for these allotments is considered a right appurtenant to the land. *United States v. Powers*, 305 U. S. 527 (1939); *Confederated Colville Tribes v. Walton*, 647 F. 2d 42 (9th Cir. 1981), *cert. denied*, 50 U. S. L. W. 3448 (1981).

[10]This data is from the *1980 Annual Report of Indian Lands*, Bureau of Indian Affairs, Office of Trust Responsibility, and an unpublished memorandum from the Chief of Real Property Management to the Assistant Area Director of the Bureau of Indian Affairs dated April 30, 1980.

lane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 314 (1950). This Court established the "notice and opportunity to be heard" requirement prior to the passage of the Fourteenth Amendment stating lack of notice was "an illegitimate assumption of power". *D'Arcy v. Ketchum*, 11 How. 165, 174 (1850). After passage of the Fourteenth Amendment, this requirement was imposed by direct review of state court proceedings. Notice and opportunity to be heard are the "first principles of justice", *Pennoyer v. Neff*, 95 U. S. 714, 732 (1878), and the "fulcrum of due process", *In re Gault*, 387 U. S. 1, 73 (1967), as has been reaffirmed in at least seventy-seven decisions by this Court.[11]

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[11] *Greene v. Lindsey*, — U. S. —, 50 U. S. L. W. 4483 (May 17, 1982); *Barry v. Barchi*, 443 U. S. 55 (1979); *Mackey v. Montrym*, 443 U. S. 1 (1979); *Dixon v. Love*, 431 U. S. 105 (1977); *Mathews v. Eldridge*, 424 U. S. 319 (1976); *North Georgia Finishing Inc. v. DiChem*, 419 U. S. 601 (1975); *Goss v. Lopez*, 419 U. S. 565 (1975); *Wolff v. McDonnell*, 418 U. S. 539 (1974); *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974); *Mitchell v. W. T. Grant Co.*, 416 U. S. 600 (1974); *Arnett v. Kennedy*, 416 U. S. 134 (1974); *Gagnon v. Scarpelli*, 411 U. S. 778 (1973); *Perry v. Sindermann*, 408 U. S. 593 (1972); *Morrissey v. Brewer*, 408 U. S. 471 (1972); *Fuentes v. Shevin*, 407 U. S. 67 (1972); *Stanley v. Illinois*, 405 U. S. 645 (1972); *Connell v. Higginbotham*, 403 U. S. 207 (1971); *Bell v. Burson*, 402 U. S. 535 (1971); *Wisconsin v. Constantineau*, 400 U. S. 433 (1971); *Wheeler v. Montgomery*, 397 U. S. 280 (1970); *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *In re Ruffalo*, 390 U. S. 544 (1968); *In re Gault*, 387 U. S. 1 (1967); *Armstrong v. Manzo*, 380 U. S. 545 (1965); *Willner v. Committee on Character*, 375 U. S. 950 (1963); *Schroeder v. New York*, 371 U. S. 208 (1962); *Greene v. McElroy*, 360 U. S. 474 (1959); *Spieser v. Randall*, 357 U. S. 513 (1958); *Walker v. Hutchinson*, 352 U. S. 112 (1956); *Slowchower v. Board of Education of New York*, 350 U. S. 551 (1956); *Covey v. Town of Somers*, 351 U. S. 141 (1956); *New York v. N. Y., N. H. & R. R. Co.*, 344 U. S. 293 (1953); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S.

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These principles have been applied specifically to several aspects of this case. *First*, notice and opportunity to be heard has been specifically required in litigation involving Indian property rights since 1850,[12] for

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306 (1950); *Griffin v. Griffin*, 327 U. S. 220 (1946); *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1941); *Cheseboro v. Los Angeles County Flood Control Dist.*, 306 U. S. 459 (1939); *West Ohio Gas Co. v. Pub. Util. Comm'n.*, 294 U. S. 63 (1935); *United States v. Illinois Central R. Co.*, 291 U. S. 457 (1934); *Southern R. Co. v. Virginia*, 290 U. S. 190 (1933); *Goldsmith v. U. S. Board of Tax Appeals*, 270 U. S. 117 (1926); *Browning v. Hooper*, 269 U. S. 396 (1926); *Turner v. Wade*, 254 U. S. 64 (1920); *Hancock v. Muskogee*, 250 U. S. 454 (1919); *Embree v. Kansas City & Liberty Blvd. Road Dist.*, 240 U. S. 242 (1912); *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915); *Grannis v. Ordean*, 234 U. S. 385 (1913); *Jacob v. Roberts*, 223 U. S. 261 (1912); *Fairbanks v. United States*, 223 U. S. 215 (1912); *United States ex rel. Turner v. Fisher*, 222 U. S. 204 (1911); *Londoner v. Denver*, 210 U. S. 373 (1908); *Central of Georgia R. Co. v. Wright*, 207 U. S. 127 (1907); *Security Trust Co. v. Lexington*, 203 U. S. 323 (1906); *Hibben v. Smith*, 191 U. S. 310 (1903); *Glidden v. Harrington*, 189 U. S. 255 (1903); *Louisville and Nashville R. Co. v. Schmidt*, 177 U. S. 230 (1900); *Roller v. Holly*, 176 U. S. 398 (1900); *Hovey v. Elliott*, 167 U. S. 409 (1897); *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112 (1896); *Pittsburg L. C. & R. R. Co. v. Backus*, 154 U. S. 421 (1894); *Paulsen v. Portland*, 149 U. S. 30 (1893); *Scott v. McNeal*, 154 U. S. 34 (1894); *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701 (1884); *Spencer v. Merchant*, 125 U. S. 345 (1888); *Walston v. Nevin*, 128 U. S. 578 (1888); *Davidson v. New Orleans*, 96 U. S. 97 (1878); *Pennoyer v. Neff*, 95 U. S. 714 (1878); *Windsor v. McVeigh*, 93 U. S. 274 (1876); *Kennard v. Louisiana*, 92 U. S. 480 (1876); *Ray v. Norseworthy*, 23 Wall. 128 (1875); *Dupasseur v. Rochereau*, 88 U. S. 130 (1875); *Rees v. City of Watertown*, 19 Wall. 107 (1874); *Baldwin v. Hale*, 1 Wall. 223 (1864); *Webster v. Reid*, 11 How. 437 (1850); and *D'Arcy v. Ketchum*, 11 How. 165 (1850).

[12]*Webster v. Reid*, 11 How. 437 (1850). *See* also *United States ex rel. Turner v. Fisher*, 222 U. S. 204 (1911); *Fairbanks v. United States*, 223 U. S. 215 (1912); *Pence v. Kleppe*, 529 F. 2d 135 (9th Cir. 1976); *Johnson v. Lower Elwha Tribal Community*, 484 F. 2d 200 (9th Cir. 1973).

allotment rights are protected by the Fifth Amendment,[13] so allotees have the right to assert these rights. *Poafpybitty v. Skelly Oil Co.*, 390 U. S. 365 (1968). *Second*, personal notice to riparian land owners has been required by due process in state water rights litigation. *Schroeder v. New York*, 371 U. S. 208 (1962) (holding notice by publication insufficient). When these principles are applied to the Montana state court procedures, Montana clearly does not have jurisdiction over these 12,487 parcels of Indian land consonant with the requirements of due process.

The notice procedures used in the Montana state proceedings are set forth in Mont. Code Ann. § 85-2-213 (1979). These procedures include publication, posting in county courthouses, and personal service upon the United States Attorney General. The only personal service for individual landowners is by enclosing a copy of the Montana Supreme Court's order, requiring an appearance in the proceedings, in the annual county property tax notices. While mailing such notice in property tax forms is sufficient personal notice for most property owners, it is *not* adequate for trust allottees since trust allotments are immune from state property taxes. *United States v. Rickert*, 188 U. S. 432 (1903); 25 U. S. C. § 348. As trust allottees' lands are immune from state taxes, they receive no

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[13] *Oklahoma Tax Comm'n. v. United States*, 319 U. S. 598, 603 (1943); *County of Mahnomen v. United States*, 319 U. S. 474, 476 (1943); *Mott v. United States*, 283 U. S. 747, 752 (1931); *Carpenter v. Shaw*, 280 U. S. 363, 365-66 (1929); *Sizemore v. Brady*, 235 U. S. 441, 449 (1914); *Ward v. Love County*, 253 U. S. 17, 20-21 (1919); *Williams v. Johnson*, 239 U. S. 414, 419 (1915); *Choate v. Trapp*, 224 U. S. 665 (1912); *Gleason v. Wood*, 224 U. S. 679 (1912); *English v. Richardson*, 224 U. S. 680 (1912); *Jones v. Meehan*, 175 U. S. 1 (1899).

state tax notices, hence receive no notice of any requirement to appear in the state water rights litigation.

This lack of personal notice is a violation of due process for trust allottees because the right to a hearing must not be "illusory". *Mills v. Habuetzel*, — U. S. —, 50 U. S. L. W. 4372, 4373 (Apr. 5, 1982); *Spencer v. Merchant*, 125 U. S. 345, 355 (1888). Yet "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending. . . ." *Mullane*, 339 U. S. at 314. Adequate notice to people to defend their established property rights[14] must be "reasonably certain to inform those affected . . .", *Mullane*, 339 U. S. at 317, and this requires personal notice if the identity of the allottees are "readily ascertainable" from "deed records". *Schroeder v. New York*, 371 U. S. at 210. Lack of such personal notice requires "compelling or persuasive reasons why such direct notice cannot be given." *Walker v. Hutchinson*, 352 U. S. 112, 116 (1956). *See* also *Greene v. Lindsey*, — U. S. —, 50 U. S. L. W. 4483 (May 17, 1982).

As applied to the instant case, the names of trust allottees are available from each reservation's Bureau of Indian Affairs title records as well as the title records for trust lands kept in the Billings, Montana area office (which includes all Indian reservations in Montana).[15]

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[14]The rights of trust allotment owners and their heirs to federally reserved water rights have been repeatedly recognized. *Winters v. United States*, 207 U. S. 564 (1908); *United States v. Powers*, 305 U. S. 527 (1939); *Arizona v. California*, 373 U. S. 546, 595-602 (1963); *Confederated Colville Tribes v. Walton*, 647 F. 2d 42 (9th Cir. 1981), *cert. denied*, 50 U. S. L. W. 3448 (1981).

[15]As long as the allotment lands are held in trust, title records are kept by the B. I. A. rather than the county Clerk and Recorder.

Therefore, the identity of the trust allottees are "readily ascertainable" from the "deed records" per *Schroeder*. Yet the petitioners have offered no reason, let alone a "compelling or persuasive reason" for their complete failure to provide personal service to these property owners. Moreover, during the pendency of this case neither the Montana legislature, nor the state water courts, nor administrative officials have taken any steps to remedy this gaping defect in their ostensibly "comprehensive" proceedings; assuming the state may validly serve notice on an Indian reservation.[16]

Petitioners claim the McCarran Amendment joinder is all that is necessary in the state proceedings. However, the McCarran Amendment cannot cure this notice defect for several reasons. *First*, notice and opportunity to be heard is a constitutional requirement with which the federal government, as well as the states, must comply.[17] Absent compliance with due process requirements, any judicial decree is void. *Pennoyer v. Neff*, 95 U. S. 714,

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[16]The weight of authority holds that service of state process on an Indian on a reservation is not valid. *Arizona ex rel. Merrill v. Turtle*, 413 F. 2d 683 (9th Cir. 1969); *Annis v. Dewey County Bank*, 334 F. Supp. 132 (D. S. D. 1971); *Francisco v. State*, 556 P. 2d 1 (Ariz. 1976); *Benally v. Marcum*, 553 P. 2d 1270 (N. M. 1976); *Martin v. Denver Juvenile Court*, 493 P. 2d 1093 (Colo. 1972). *Contra, see State ex rel. Old Elk v. District Court*, 170 Mont. 208, 552 P. 2d 1394 (1976); *Little Horn Bank v. Stops*, 170 Mont. 510, 555 P. 2d 211, *cert. denied* 431 U. S. 924 (1977); *Bad Horse v. Bad Horse*, 163 Mont. 445, 517 P. 2d 893, *cert. denied* 419 U. S. 847 (1974).

[17]*Mathews v. Eldridge*, 424 U. S. 319 (1976); *Arnett v. Kennedy*, 416 U. S. 134 (1974); *Opp Cotton Mills v. Administrator* 312 U. S. 126 (1941); *United States v. Illinois Central R. Co.*, 291 U. S. 457 (1934); *United States ex rel. Turner v. Fisher*, 222 U. S. 204 (1911).

728 (1878); *Webster v. Reid*, 11 How. 437, 460 (1850). *Second*, the conflicts of interest between Indian water interests and other federal interests would render the derivative representation of Indian water rights by the federal government in this case (as petitioners contend the McCarran Amendment envisions) violative of trust allottees' rights to due process. *See Hansberry v. Lee*, 311 U. S. 32 (1940), as discussed at Sec. II D, *supra*. *Third*, assuming the United States' derivative representation is even appropriate in this case, notice to the beneficiaries of this representation is still required by due process. *Mullane, supra*. *See* also *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974). In the *Mullane* case, Mr. Mullane was appointed as the attorney to represent a class of beneficiaries. Despite his vigorous representation of this class, in addition, this Court required notice to the class members of the pending suit. No less should be required in this case.

Notice by publication is insufficient in this case. In holding notice by publication a violation of due process, this Court in *Mullane* observed:

> But when notice is a person's due, process which is a mere gesture is not due process . . . It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts.

339 U. S. at 320.

And:

> Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may

> be tucked away in it that affects his property interests.

339 U. S. at 320.

Thus *Mullane* required notice by mail to all parties whose addresses were known. *See* also *Greene v. Lindsey*, — U. S. —, 50 U. S. L. W. 4483 (May 17, 1982). Similarly, in this case personal notice, at least by mail, should be provided because the names and addresses of trust allottees are "readily ascertainable" from the "deed records", *Schroeder v. New York*, 371 U. S. at 210, and other B. I. A. records.

Denominating the proceeding *in rem* does not justify the elimination of personal notice in the state court proceedings. The authorities cited in the Colorado Amicus do not support notice by publication alone as applied to this case.[18] Moreover, this Court specifically rejected the sufficiency of publication notice based on a distinction between *in personam* and *in rem* suits. *Mullane*, 339 U. S. at 311-13. Cf. *Shaffer v. Heitner*, 433 U. S. 186

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[18]The *Amicus* brief of the Colorado Attorney General cites *Jacob v. Roberts*, 223 U. S. 261 (1912), and *Dupasseur v. Rochereau*, 88 U. S. 130 (1875), for the proposition that publication is sufficient in *in rem* proceedings. While *Dupasseur* did make such a statement, it was dicta, for this Court found the party who had not received notice was not bound by the judgment. In *Jacob* this Court approved notice by publication only because the defendant could not be located after "diligent search and inquiry", 223 U. S. at 264. *Mullane* stated publication was sufficient in this situation, 339 U. S. at 317. To the extent *Jacob* or *Dupasseur* may be read as supporting publication in *in rem* proceedings where the name and location of the parties are known, they must be considered overruled by *Schroeder v. New York*, 371 U. S. 208 (1962), and *Walker v. Hutchinson*, 352 U. S. 112 (1956), that required personal notice in condemnation proceedings, which are *in rem* in nature.

(1977). This distinction should also be rejected in this case.

For the state courts to purport to adjudicate the water rights for 12,478 parcels of trust allotment land totalling almost 3,000,000 acres, would be a violation of due process, resulting in a void decree as applied to these landowners. This clearly renders the state proceedings piecemeal, hence an inappropriate forum according to the *Akin* decision.

D. The Federal Government Cannot Represent Absent Indian Parties In This Litigation Because The Conflicts Of Interest Between Indian Water Rights And Other Conflicting Federal Water Interests Render The Doctrine Of Virtual Representation Inapplicable And Denies The Absent Parties' Due Process Of Law.

The petitioners claim joinder of the federal government under the McCarran Amendment is sufficient to obtain jurisdiction over all Indian water interests. This assumes the federal government will fully represent the absent Indian interests, binding the absent parties under the doctrine of virtual representation. This assumption is erroneous.

True, the federal government may normally represent absent Indian parties in litigation[19] under the doctrine of

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[19] *Heckman* v. *United States*, 224 U. S. 413 (1912); 25 U. S. C. § 175. However, the federal government's conflicts of interest serve as a limitation on the federal government's capacity to represent non-party Indians under the Heckman rule. See discussion *infra*, of *United States of Gila River Pima-Maricopa Indian Community*, 391 F. 2d 53, 56 (9th Cir. 1968); *Rin-*

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virtual representation.[20] Under the doctrine of virtual representation, a trustee, guardian or class representative may represent the interests of absent parties, binding them to the results of the litigation if the party active in the litigation fully and adequately represents the absent parties.[21] It is clear, however, that litigation may not bind absent parties if the interests of the trustee or class representative active in the litigation conflict with the interests of the absent parties. In such instances the "virtual representative" is simply not fully and adequately representing the absent parties with the undivided loyalty required by due process in our adversarial system. *Hansberry v. Lee*, 311 U. S. 32 (1940). Applying the authority underlying this principle to the instant case, the federal government cannot purport to represent and bind absent, unnotified

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con Band of Mission Indians v. Escondido Mutual Water Co., 459 F. 2d 1082, 1085 (9th Cir. 1972); *Manygoats v. Kleppe*, 558 F. 2d 556, 558 (10th Cir. 1977); *United States v. Southern Pacific Transportation Co.*, 543 F. 2d 767, 680 n. 3 (9th Cir. 1976); and *Siniscal v. United States*, 208 F. 406 (9th Cir. 1953).

[20]*Black's Law Dictionary*, 1742 (1951) defines the doctrine of virtual representation as: "Under this doctrine where parties interested are numerous and the suit is for an object common to all of them, some of the body may maintain a bill on behalf of themselves and of the others." (Authorities omitted.)

[21]*Hansberry v. Lee*, 311 U. S. 32 (1940). In class actions for the doctrine of virtual representation to apply, the class representative must " . . . fairly and adequately protect the interests of the class." F. R. Civ. P. Rule 23(a)(4). As applied to the federal government's representing absent Indian property interests, the *Heckman* case required: "There can be *no more complete representation* than that on the part of the United States in acting on behalf of these dependents which Congress, with respect to the restricted lands, has not yet released from tutelage." 224 U. S. at 444. (Emphasis added.)

Indian landowners, due to the federal government's conflicts of interest.

Among the diverse interests the federal government represents in the Montana litigation are national parks, national forests, Bureau of Reclamation projects, Bureau of Land Management lands, national monuments, military bases, wildlife refuges and customs stations. These interests, together with private water users, compete with Indian tribes and allottees for scarce water in this litigation. The federal conflict of interest is intensified by federal energy policies encouraging development of our domestic coal supplies. South Central Montana, including the Tongue and Big Horn River drainages, contain immense deposits of coal. The utilization of these deposits will require large amounts of water. These competing policies of encouraging large scale coal development versus assertion of Indian water rights, has quite simply caught the federal government in a squeeze. For example, to further its energy policies, the federal government has sold option contracts to sell large quantities of water in South Central Montana which has been aptly described as "disastrous to Indian interests."[22] So, if the full extent of Indian reserved water rights are recognized by the trial court in this litigation, there may be insufficient water to honor both the Indian reserved water rights and the option contracts already executed

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[22]Veeder, *Confiscation of Indian Winters Rights In The Upper Missouri River Basin*, 21 So. Dak. L. Rev. 282, 294 (1976); See also Veeder, *Water Rights In The Coal Fields Of The Yellowstone River Basin*, 40 Law and Contemporary Problems 77, (1976); Young, *Interagency Conflicts Of Interest: The Peril To Indian Water Rights*, Law And The Social Order, 328 (1972).

by the federal government. This type conflict raises serious questions regarding the federal government's "undivided loyalty"[23] in representing Indian water rights in this litigation.

Non-parties should be joined as parties where the federal government may have conflicting interests. *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972). Therefore, logically enough the case law specifically on point, dealing with the federal government representing Indians not party to litigation, applies the normal conflict of interest principles. Because "It is clear that the United States Attorney could not properly represent both sides in these cases. Congress seems to have been aware of the possibility of conflict of interest." *United States v. Gila River Pima-Maricopa Indian Community,* 391 F. 2d 53, 56 (9th Cir. 1968), the federal government cannot represent Indian interests when presented with a "conflict of interest." *Rincon Band of Mission Indians v. Escondido Mutual Water Co.,* 459 F. 2d 1082, 1085 (9th Cir. 1972). *See* also *Manygoats v. Kleppe,* 558 F. 2d 556, 558 (10th Cir. 1977); *United States v. Southern Pacific Transportation Co.,* 543 F. 2d 676, 680 n. 3 (9th Cir. 1976); and *Siniscal v. United States,* 208 F. 406 (9th Cir. 1953). Moreover this conflicts rule has been specifically applied to Indian water rights litigation by the Tenth Circuit holding:

> "The Pueblos claim an interest in the water which is the subject of the action and disposition may affect their ability to protect their interest. The claims that

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[23] *Seminole Nation v. United States,* 316 U.S. 286, 297 n. 12 (1942); *Navajo Tribe v. United States,* 364 F. 2d 320 (Ct. Cl. 1966).

> the Pueblos are adequately represented by government counsel is not impressive. Government counsel are competent and able but they concede that a *conflict of interest exists between the proprietary interes's of the United States and of the Pueblos. In such a situation, adequate representation of both interests by the same counsel is impossible. New Mexico v. Aamodt,* 537 F. 2d 1102, 1106 (10th Cir. 1976). (Emphasis added.)

See also *United States v. Truckee-Carson Irrigation District,* 649 F. 2d 1286 (9th Cir. 1981), *modified* at 666 F. 2d 351 *cert. granted,* 51 U. S. L. W. 3287 (1982).

Addressing conflicting federal purposes in dealing with Indians, the Court of Claims aptly noted:

> it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

Three Tribes of Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 290 F. 2d 686, 691 (1968). Thus, the authority directly in point bars the federal government's representation of conflicting non-party Indian interests such as those presented by the instant case.

Heckman v. United States, 224 U. S. 413, 444-46 (1912), allowed the federal government to represent absent Indian parties as trustee[24] for the Indians, provided fiduciary

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[24] *Akin,* allowed McCarran Amendment jurisdiction over Indian water rights based on the federal government's "trusteeship", 424 U. S. at 810 of these rights. In *Poafpybitty v. Skelly Oil Co.,* 390 U. S. 365, 374 (1968) this Court characterized the federal government's assertion of allotment act rights as a "trust obligation." The trusteeship nature of the federal government's obligation to defend allotments from adverse claims

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standards were maintained in the litigation.[25] Similarly, *Akin* allowed the federal government to represent Indian water rights under its "trusteeship", 424 U. S. at 810, of Indian lands. This Court has characterized the standard of federal conduct acting as trustee as follows:

> They are an unlettered people, unskilled in the use of language . . . with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness.

United States v. Payne, 264 U. S. 446-448 (1924). However applying the applicable trust law to federal representation of absent Indian parties, a trustee may *not* represent a non-party beneficiary "where the trustee has an adverse interest to that of the beneficiary".[26] So the trust

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was emphasized in *United States v. Mason*, 412 U. S. 391, 398 (1973): "There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust." See also *United States v. Mitchell*, 445 U. S. 535 (1980) acknowledging a statutory duty under the allotment acts to protect allotments from unlawful alienation.

[25]In *Heckman v. United States*, this Court described the standard of conduct required of the federal government as: "There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents which Congress, with respect to the restricted lands, has not yet released from tutelage." 224 U. S. at 444.

[26]*Bogart on Trusts*, sec. 593 (2d Ed. 1960). *See* also, *Rand v. Walker*, 117 U. S. 340 (1885); *Atwood v. Rhode Island Hospital Trust Co.*, 275 F. 513 (1st Cir. 1921), *cert. denied*, 257 U. S. 661 (1922); *Illinois National Bank v. Gwinn*, 390 Ill. 345, 61 N. E. 2d 249 (1945); *Cameron v. White*, 128 Okla. 251, 262 P. 664 (1928); *Alexander v. Title Insurance and Trust Co.*, 48 Cal. App. 2d 488, 119 P. 2d 992 (1941).

law underlying this basis for the doctrine of virtual representation prohibits the federal government from representing absent Indian parties in this case due to the existing conflicts of interest.

Also, to allow the federal government to represent the non-party, unnotified Indian allottees in spite of the federal government's conflicts of interest, would violate the due process rights of the allottees. This principle was firmly established in *Hansberry v. Lee*, 311 U. S. 32 (1940). In *Hansberry*, the respondents sought to enforce res judicata against class members of an earlier class action. However, because of the earlier class representative's "potentially conflicting interests", 311 U. S. at 44, enforcement of res judicata against absent class members was ruled a violation of due process. This Court explained:

> Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

311 U. S. at 45.

The rule set forth in *Hansberry* has "retained its vitality"[27] such that "a court cannot simply assume"[28] a class representative is adequate. Thus, a conflict of interest claim should not be dismissed absent a full judicial inquiry into the facts underlying the conflict. *Fullmer v. Harper*, 517 F. 2d 20 (10th Cir. 1975). If a violation of due process

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[27] *Southwest Airlines Co. v. Texas International Airlines Inc.*, 546 F. 2d 184, 101, n. 59 (5th Cir. 1977), relying on *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U. S. 313, 329 (1971).

[28] *Schnorbach v. Fuqur*, 70 F. R. D. 424 (1975).

is found, the class decree may be set aside on collateral attack, *Zablocki v. Redhail,* 434 U. S. 374, 330 n. 6 (1978), depriving the state water decrees of any reliable finality, which defeats the prime objective in comprehensive stream adjudications.[29]

Even if the doctrine of virtual representation were appropriate, as this case stands, notice to the beneficiaries of such representation is required. *Mullane v. Central Hanover Bank & Trust Co., supra. Eisen v. Carlisle & Jacquelin,* 417 U. S. 156 (1974).

Under the current state of the instant proceedings, the federal government cannot purport to represent the non-party Indian allottees.[30] However, Indian allottees are certainly necessary parties[31] to a comprehensive stream adjudication. So Indian allottees must be made parties to accomplish this result. Montana state courts cannot ac-

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[29]*Akin,* 424 U. S. at 819; Stone, *Are There Any Adjudicated Streams In Montana?,* 19 Mont. L. Rev. 19 (1957); Stone, *The Long Count On Dempsey: No Final Decision In Water Right Adjudication,* 31 Mont. L. Rev. 1 (1969).

[30]In *Jicarilla Apache Tribe v. United States,* 601 F. 2d 1116 (10th Cir. 1979) the Tenth Circuit purported to resolve this issue by holding that the McCarran Amendment contemplated the federal government as the defendant, representing all federal interests (including Indian interests). The Court resolved the conflict of interest by noting the tribe had a right to intervene. This however misreads the applicable law, for it assumes Indian interests may be bound, even if they do not appear, by virtue of the federal government's appearance. We submit the conflict of interest does more than confer a right to intervene. Rather the conflict of interest renders the doctrine of virtual representation inapplicable, *Hansberry v. Lee,* 311 U. S. 32 (1940), such that the doctrinal basis for binding the absent Indian interests does not exist.

[31]See authorities in footnote 29. *See* also *Dugan v. Rank,* 377 U. S. 609 (1963), and *California v. United States,* 245 F. 2d 647 (9th Cir. 1956).

complish this due to the Enabling Acts's bar, and the state statutory restrictions for personal notice. On the other hand the federal courts may properly join allottees as parties.

Moreover, the federal courts may cure the conflicts of interest problem, allowing the Indian allottees to choose between representation by the federal government and private counsel by serving the allottees with proper notice of the pending lawsuit as well as the federal government's role in this litigation (including its conflicts of interest).[32] After such notice the allottees may then choose between representation by the federal government or by private counsel. Such a procedure would afford Indian allottees with notice and opportunity to be heard as required by *Hansberry*,[33] and accommodate the ethical concerns surrounding representation of multiple parties in litigation.[34]

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[32]Under the A. B. A. *Code of Professional Responsibility*, D. R. 5-105(c), a lawyer may represent multiple clients if the client so chooses after "full disclosure".

[33]Since the representative party in *Hansberry* did not adequately represent the absent parties, such absent parties were denied their "day in court" as required by due process.

[34]The ethical rules ordinarily require consent of the client for such multiple representation in litigation. (See n. 32). However, given the "plenary" *Winton v. Amos*, 255 U. S. 373, 391 (1921) nature of federal power in Indian affairs, and the federal government's "unique obligation toward the Indians" *Morton v. Mancari*, 417 U. S. 535, 555 (1974), the continuing authority of the federal government to exercise its guardianship powers is presumed. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U. S. 649, 656 (1976); *Tiger v. Western Investment Co.*, 221 U. S. 286 (1911). Given this backdrop, the federal government should be able to represent the allottees, as parties, if the allottees are given notice of the lawsuit, the federal government's

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Since only the federal courts can accomplish this necessary joinder of Indian allottees, it is clearly the preferable forum for the instant cases.

CONCLUSION

The judgment of the court of appeals should be affirmed.

DONE AND DATED this 18th day of January, 1983.

MONTANA LEGAL SERVICES ASSOCIATION
/s/ STEVEN L. BUNCH

801 North Last Chance Gulch
Helena, MT 59601

Attorney for Respondent Bowen

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intention to represent the allottee in the lawsuit, full disclosure of the federal government's conflicts of interest in the litigation, and opportunity to choose whether to be represented by the Justice Department or private counsel; provided the trial court finds per *Fullmer v. Harper*, 517 F. 2d 20 (10th Cir. 1975) that a "good faith effort", *United States v. Sioux Nation*, 448 U. S. 871, 416 (1 '80), to protect the full extent of the allottees' water rights will be maintained in the litigation. Such a procedure should successfully accommodate the concerns of due process, and multi-party representation in litigation, in the context of the federal government's "unique obligation toward the Indians" in these proceedings.